No. 843

—IN THE—

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

EMPIRE STATE-IDAHO MINING AND DEVELOPING COMPANY, a corporation,
Appellant,

vs.

KENNEDY J. HANLEY,
Respondent.

Answering Brief of Respondent.

JOHN R. McBRIDE,
M. A. FOLSOM,
Counsel for Respondent.

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STATEMENT OF FACTS.

This cause has been before this Court on an appeal and upon a petition for a writ of mandamus. The facts are fully stated in the opinions heretofore rendered. A certified copy of the recent decision in the mandamus proceeding was presented to the Circuit Court and the following motions were made by counsel for Hanley. (1) That the order suspending the proceeding on accounting be vacated and that the master be ordered to proceed. (2) That defendants be restrained from excluding Hanley from entering the Skookum

mining claim through the ordinary approaches to the same. (3) That defendants be restrained from removing ores from within the boundaries of the Skookum mine until final decree.

After argument the Circuit Court granted the several motions, but restrained defendants from removing ore only until further order of the Court. The Empire State-Idaho Company has appealed from that order.

The Statement of Facts presented in appellant's brief is erroneous in several particulars.

It is stated that the appellant owns an undivided seven-eighths interest in the Skookum lode claim. There is nothing in the record to show that this is the fact, and no adjudication of appellant's title has been made.

It is stated that the appellant and the respondent were mining partners under the laws of Idaho in the operation of this claim. There is nothing in the record to show such a fact, but, on the contrary, the record as well as the decision of this Court conclusively shows than Hanley has never participated in the working of the Skookum claim with the appellant, but has been excluded from working the Skookum mine and his title thereto has been denied at all times, and a fraudulent attempt has been made to deprive him of his interest in the property; that he has never been permitted to participate in the proceeds of the ores and appellant has refused to pay him one dollar of the same.

The statements made as to the purpose of the complaint

and the effect of the decree of this Court are completely refuted by the opinion in the mandamus proceeding, filed May 12th in this Court.

ARGUMENT.

In the recent mandamus proceeding, Hanley complained that the mandate of this Court was not being enforced in four particulars, viz:

That the Circuit Court refused to enforce payment of costs on appeal; that it suspended an order previously made for an accounting; that it refused to assist Hanley to enter and inspect his property; and that it refused to grant an injunction or receiver for the protection of the same. A full argument was made to this Court at that time, and the question which is now presented to this Court was urged at length then. This Court held that we were entitled to have the mandate enforced, and the trial Court, in obedience to its promise to protect Hanley in his rights, made such interlocutory orders as it deemed proper for his protection.

The audacity of appellant in again presenting to this Court the same question, which was raised before, is characteristic.

The situation which is presented is this: The defendants in the case by the *grossest fraud conceivable* have secured exclusive possession of the Skookum mine and had attempted to rob Hanley of his interest. They had for more than four years vigorously defended their fraud in Court, during all of

which time they despoiled the property of its ores. They had denied Hanley the right to even view the ore bodies in controversy, and had denied their liability to account to him for the proceeds. Notwithstanding the fact that this Court, more than one year ago, defined Hanley's interest in the property, the defendants have continued in the full control of the property and have continued to deny Hanley's rights in the face of the decree.

In December, 1901, the Circuit Court ordered defendants to account, but they have not accounted, nor paid over to Hanley a single dollar. They secured a stay of proceedings before the Master. In February, 1902, the Court ordered them to deposit in the bank *to the credit of the Court* one-sixteenth of the proceeds of ore *thereafter* taken out of the property.

The property in controversy has been rapidly exhausted, and, until the accounting in this case is perfected and the decree in favor of Hanley entered, it will be impossible to determine the extent of the injury done to him. It was proper under such circumstances that the remnant of it should be preserved until the extent of past injuries could be ascertained and settled.

That Hanley for more than four years has been the owner of a one-eighth interest in the Skookum mining claim and the ores therein contained has been determined by this Court. That the defendants during all that time have been actively engaged in lessening the value of that property is undisputed.

That Hanley now has a right to determine the extent of the ravages before any further destruction shall take place seems too simple a proposition to need argument.

No final decree has been entered in this case, and the Circuit Court by its strong arm is attempting to repair the wrong which the defendants have done to Hanley. It is engaged in ascertaining the amount of that wrong and has granted an injunction prohibiting defendants from devouring what remains of the property in dispute until past accounts have been settled.

In view of the acts committed by the defendants in the past, in deliberately attempting to rob Hanley of his property, it is not strange that they should have the boldness to now assert that they have a right to the fruits of their fraud. Their argument reduced to its simplest elements is, that because they have been adjudged guilty of fraud that nothing further remains to be done; that they should be permitted to retain the property and permit Hanley to comfort himself with the empty adjudication. It is unnecessary to say that a court of equity does not do business in that way.

RELATION OF MINING PARTNERSHIP DOES NOT EXIST, AND STATUTE OF IDAHO DOES NOT APPLY.

HANLEY IS NOT A MINING PARTNER WITH SWEENY, CLARK AND THE EMPIRE-STATE MINING COMPANY. THE QUESTION OF MINING AND PARTNERSHIP IS THEREFORE NOT IN THE CASE.

Counsel for appellant has repeatedly contended that his clients have a right to work the Skookum through their own tunnel to the exclusion of Hanley, because they claim to be the owners of seven-eighths of the Skookum. The Statute of Idaho upon the subject of Mining Partnership, and decision of Hawkins vs. Spokane Hydraulic Mining Company, 33 Pac., 924, are cited in support of the contention.

As Hanley *has not engaged* with the others, in working the property, he is not a mining partner.

The Supreme Court of Montana, in Anaconda Co. vs. Butte Co., 43 Pac., 925, thus correctly states the rule:

"A mining partnership is formed by reason of the exist-
" ence of certain facts described in the Statute. Those facts
" are: (1) That two or more persons shall own or acquire a
" mining claim for the purpose of working or extracting the
" minerals therefrom; that is to say, the relationship arises
" from the ownership of the shares or interests in the mine.
" This is the first fact of a foundation for a mining partner-
" ship. (2) The second fact required to exist is that such
" owners actually engage in working the mine. Do these
" two conditions exist in the case at bar? The first condition
" is a fact. Plaintiff and defendant own and have acquired
" for mining purposes the ground in controversy. *The second*
" *fact does not exist.* The plaintiff and defendant were not
" actually engaged i nworking the mine. This is clear from
" the pleadings and the testimony. *The plaintiff was working*
" *the disputed portion alone,* excluding the defendant there-

" from, *therefore the partnership did not exist.* (Citing sev-
" eral cases, including the Hawkins vs. Spokane case.) * * *
" In the Hawkins' case last cited there is one remark tending
" to show that the Court held a different view; but the Court
" stated that *a partnership was admitted* in that case, and in
" the opinion, further on, cited the case of Dougherty vs.
" Creary and that of Duryea vs. Burt (*supra*). Therefore
" we consider the question of mining partnership as not in this
" case." See to same effect, First National Bank vs. Hailey,
89 Fed., 449; 95 Fed., 35.

In the Hawkins' case the Court said: *"This partnership " is admitted by the defendant."* 28 Pac., 434, and further said:

"If the power thus held and exercised by the majority
" is used in a manner that will imperil or disastrously affect the
" interests of the minority, the latter has the right to resort
" to the court for redress and protection."

That Hanley's rights have been ignored and his interests imperiled has been established by former decisions of this Court. Because he has sought redress and protection in Court, and has been awarded it, defendants complain. While no partnership exists in this case, even if it did, the authority cited by counsel abundantly justified the order complained of.

The facts in the case at bar come squarely within the Anaconda case, and it is clear that Hanley cannot be held to be a mining partner with those who have attempted to rob him

of his interest in the Skookum and have despoiled the claim of its ores while excluding him from the property and the profits.

APPELLANT IS NOT ENTITLED TO CONTINUE TO FURTHER DESPOIL THE SKOOKUM MINE OF ITS ORES PENDING THE LITIGATION, BY REASON OF THE FACT THAT IT OWNS AN INTEREST IN THE CLAIM.

Counsel contended in the Circuit Court that even though his clients should not be held to be mining partners with Hanley, they should be permitted to remove the ores pending litigation. That they are tenants in common with Hanley in the property may be true. But that they have exclusively controlled for more than three years and still exclusively control the only opening to the ore bodies is undisputed. They have for more than three years denied Hanley's rights and still deny them. They have never paid or offered to pay one dollar to Hanley out of the profits received. The trial Court, on May 17, 1902, enjoined them from removing any ore from the property until further order, and at the same time enjoined them from preventing Hanley from entering the mine. Counsel contends that because the Court has compelled them to permit Hanley to enter the mine that the order enjoining his clients from working the ores should not have been made; that Hanley is no longer excluded, and therefore, defendants should be allowed to work.

It is too well settled to admit of argument that one tenant in common may not work the common property to the ex-

clusion of his co-tenant. If he does so he is a trespasser and may be enjoined.

Butte and Boston Co. vs. Montana Co., 60 Pac., 1039.

Anaconda Co. vs. Butte Co., 43 Pac., 924.

Sears vs. Sellew, 28 Iowa, 506.

If one tenant in common extracts ore from the common property *through his own shaft* on another claim, such action is an assumption of exclusive ownership, and an injunction will lie.

Anaconda Co. vs. Butte Co., 43 Pac., 924.

To constitute exclusion force need not be used. Denial of title or securing possession of the whole property by fraud amounts to exclusion.

Zapp vs. Miller, 109 N. Y., 57.

From the very nature of things Hanley cannot work the property, the only approach to the ores being a tunnel having its portal in the claim of defendants.

It is not surprising that these defendants, who have acquired possession of property by gross fraud and have kept possession of it by resort to every conceivable defense, should squirm when the hand of the Court is laid upon them. For years they have, by keeping up a fight, retained control of the ore bodies in dispute and have well nigh destroyed them. The Circuit Court has at last called a halt. It has said to these defendants: You shall not utterly destroy this property until the person whom you have wronged has been protected and the amount of damage you have done him has been ascer-

tained and adjusted. The only question to be decided upon this appeal is: Whether an empty adjudication shall be all that Hanley shall have, or whether he is entitled to have his property protected?

As the Supreme Court said in Rubber Company vs. Goodyear, 9 Wall., 803:

"The conduct of the defendants in this respect has not "been such as to commend them to the favor of a court of "equity. Under such circumstances every doubt and difficulty "should be resolved against them."

No final decree has been entered in this case by the trial Court. Such interlocutory decrees have been made as the circumstances of this case require for the ascertainment of the amount of past injuries and the preservation of the undestroyed remnant of the property until final decree.

The order appealed from was properly made for the purpose just stated, and should not be disturbed.

St. Paul, Etc., Co. vs. Northern Pac. R. R. Co., 4 U. S. Appeals, 149 *et seq.*

Respectfully submitted,

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